THE STRICKLAND STANDARD FOR CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL:
EMASCULATING THE SIXTH AMENDMENT IN THE GUISE OF DUE PROCESS

RICHARD L. GABRIEL†

As the Supreme Court has recently reaffirmed, "When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the sixth amendment has occurred." 1 Though many have argued in favor of modifications of or alternatives to the adversarial system, 2 few, if any, have doubted the Supreme Court's conclusion that the sixth amendment was intended to protect that system. 3 In the ideal adversarial system, 4 opposing attorneys present the strongest arguments for their respective sides in equally competent manners. An impartial third party determines from those arguments "the best answers to the

† B.A. 1984, Yale University; J.D. Candidate 1987, University of Pennsylvania.


2 Judge Frankel, for example, argues that the search for truth would be served better by a reformed trial system. See Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1052-59 (1975). Although Judge Frankel argues, "[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve," id. at 1032, he prefers to reform rather than to abandon the adversary system. Judge Frankel makes three proposals for reform. First, he calls for a modification of the adversarial ideal. Second, he urges that truth be made a paramount objective. Finally, he suggests imposing a duty upon the contestants to pursue this objective. Id. at 1052-59.

Professor Frank argues more forcefully against the adversarial system. See J. Frank, COURTS ON TRIAL 80-102 (1949). Professor Frank argues that the "fight" theory upon which the adversarial system is based frequently "blocks the uncovering of vital evidence or leads to a presentation of vital testimony in a way that distorts it." Id. at 81. Arguing that truth is the goal of a judicial inquiry, Professor Frank suggests two reforms in civil procedure that help to effectuate his "truth" theory and proposes another. He lauds the then new device of discovery and encourages trial judges to make more use of their authority to call witnesses. See id. at 93. He also suggests the appointment of impartial officials to do pre-trial investigation. See id. at 97-98.

3 See, e.g., Frankel, supra note 2, at 1052 ("For most of us trained in American Law, the superiority of the adversary process over any other is too plain to doubt or examine."); Gorsky, The Adversary System, in PHILOSOPHICAL LAW 127, 130 (R. Bronaugh ed. 1978) (In the courts, "the adversary system tends to be accepted without much question.").

4 Ideally, "an adversarial trial promotes decisions that are well grounded on both the law and the facts because each side will, with partisan zeal, bring to the court's attention all the material favorable to that side, and, therefore, no relevant consideration will escape its notice." Golding, On The Adversary System and Justice, in PHILOSOPHICAL LAW 98, 106 (R. Bronaugh ed. 1978).

(1259)
disputed questions of fact.5 Once the facts are established, the judge applies the relevant legal authority to these facts, and justice is served.6

In the real world, however, the best that we can do is to ensure that opposing counsel provide approximately equal representations of their respective positions.7 This notion has consistently led the Supreme Court to hold that the "assistance of counsel"8 required for an accused by the sixth amendment be "effective assistance of counsel."9 But what level of professional performance constitutes effective assistance of counsel?

In Strickland v. Washington,10 the Supreme Court formulated a standard of ineffective assistance of counsel that would unify the disparate approaches of the state and federal courts. Writing for the Court, Justice O'Connor developed a two-pronged test. In order to show ineffective assistance of counsel, a defendant first must show that the attorney's representation fell below "an objective standard of reasonableness."11 Second, a defendant must prove that the attorney's inadequate representation prejudiced the defendant. A defendant is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."12

6 Id. at 108.
6 As Justice Cardozo explained:

[In] a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. Stare decisis is at least the everyday working rule of our law.

7 See Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").
8 U.S. CONSt. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").
9 See Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The effective assistance of counsel . . . is a constitutional requirement of due process . . ."); see also Glasser v. United States, 315 U.S. 60, 69-70 (1942) (stating that the sixth amendment guarantee of "‘assistance of counsel’" must be "untrammeled and unimpaired" by a court's ineffective appointment of counsel); Avery v. Alabama, 308 U.S. 444, 446 (1940) ("The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."); Powell v. Alabama, 287 U.S. 45, 71 (1932) ("[I]n a capital case, . . . it is the duty of the court, whether requested or not, to assign counsel . . . and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.").
11 Id. at 2065.
12 Id. at 2068.
This Comment argues that the two-pronged test for effective assistance of counsel enunciated in Strickland undermines the goal of the sixth amendment—a just result achieved through a proper adversarial proceeding. The test eliminates the procedural requirement by which the goal of a just result is to be attained. Absent the procedural requirement, the test allows a court to presume guilt before it is certain that the accused has been convicted through the properly functioning processes of the adversary system.

It should be noted that, throughout this Comment, "procedural right" and "procedural requirement" refer to the sixth amendment's enumerated protections. For example, representation by counsel is a mechanism by which the rights of a criminal defendant are enforced. If a criminal defendant is denied counsel, irrespective of a judge's perception of the impact of such a denial on the fairness of the trial result, the defendant's rights have been violated.

Part I of this Comment reviews the Supreme Court's enunciation of the effective assistance of counsel standard in Strickland v. Washington. Part II frames the effective assistance of counsel as a procedural right and establishes the necessary relationship between this right and the workings of the adversary system. Part III argues that the Strickland test emasculates the sixth amendment by substituting for the procedural guarantee of that amendment a substantive inquiry into the fundamental fairness of the result of the trial. The analysis criticizes the prejudice component of the Strickland test, which in theory eviscerates the procedural right and in practice eliminates the defendant's opportunity to gain a new trial where ineffective assistance of counsel has been rendered. Part IV proposes an alternative standard for the effective assistance of counsel that reflects a paramount commitment to the tenets of the adversarial system, as reflected in the sixth amendment's procedural guarantee. The standard calls for a new trial whenever ineffective assistance of counsel is rendered.

I. THE STRICKLAND V. WASHINGTON LITIGATION

A. STATE COURT PROCEEDINGS

In September of 1976, David Leroy Washington and two accomplices planned and committed three groups of crimes, which included three brutal murders, torture, kidnapping, assaults, attempted murder, attempted extortion, and theft. After his two accomplices were ar-
rested, Washington voluntarily surrendered to the police and confessed to the third of the murders. Shortly thereafter, the state indicted Washington solely for this murder and appointed William Tunkey as his attorney.14

Ignoring the advice of his attorney, Washington subsequently confessed to the other two murders. The state indicted Washington on these additional counts, and a trial date was set. Washington waived his right to a jury trial and, again ignoring his counsel’s advice, pleaded guilty to all of the charges in the indictments.15 During his plea colloquy, Washington explained that his actions were the “result of extreme stress and anxiety due to his unemployment and his corresponding inability to provide for his family,” and he further stated that he had no significant prior criminal record.16 Washington nonetheless accepted responsibility for his crimes. The trial judge responded that he had “a great deal of respect for people who are willing to step forward and admit their responsibility.”17

Washington also waived his right to have a sentencing jury, choosing instead to be heard by a judge.18 Prior to that hearing, Tunkey spoke with Washington about his personal background; additionally, he spoke with Washington’s wife and mother on the telephone. Tunkey sought no other character witnesses nor did he request a psychiatric examination, as he found no indication that Washington had any psychological problems.19 Tunkey decided not to present any evidence concerning Washington’s character and emotional state, believing the possibility of overcoming the evidentiary effects of Washington’s confessions to be hopeless.20 Tunkey decided instead to rely on the plea colloquy and the trial judge’s statement acknowledging respect for those who admit their responsibility.21 By presenting no new evidence, Tunkey prevented the state from cross-examining Washington with regard to his claims of emotional distress and the absence of a significant prior criminal record, and he blocked any state attempt to introduce psychiatric evidence of its own.22 The sentencing judge found numerous days later, Washington killed Mrs. Birk and severely wounded three of her family members. Finally, Washington and an accomplice kidnapped and killed Mr. Meti, a college student, after attempting to extort money from the student’s parents. Id.

14 See id. at 1247.
15 See id.
16 Id.
17 Id.
18 See id.
20 See id.
21 See id.
22 See id.
aggravating factors and no mitigating factors and sentenced Washington to death on each of the capital murder counts.\textsuperscript{23} The Florida Supreme Court upheld the conviction and sentences on direct appeal.\textsuperscript{24}

Washington subsequently sought collateral relief in state court on numerous grounds, including the allegation that he was denied effective assistance of counsel at the sentencing hearing. Washington asserted that his counsel was ineffective because "he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts."\textsuperscript{25} The trial court rejected all six of Washington's challenges.\textsuperscript{26} The Florida Supreme Court affirmed this denial of relief,\textsuperscript{27} holding that Washington failed to make out a prima facie case either of "substantial deficiency or possible prejudice" and that he "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief."\textsuperscript{28}

B. Proceedings in the Lower Federal Courts

Washington next filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, again alleging the denial of effective assistance of counsel.\textsuperscript{29} The district court concluded that there did not appear to be a likelihood, or even a significant possibility, that any errors of Washington's trial attorney affected

\textsuperscript{23} See id. at 2058.
\textsuperscript{25} Strickland v. Washington, 104 S. Ct. 2052, 2058 (1984). In support of these claims, Washington submitted 14 affidavits from friends, neighbors, and relatives stating that they would have served as character witnesses. He also submitted one psychiatric and one psychological report stating that he was "chronically frustrated and depressed because of his economic dilemma" at the time he committed his crimes. Id.
\textsuperscript{26} See id. at 2059. The trial court found:

[As a matter of law, the record affirmatively demonstrates that even if counsel had done each of the ... things [that respondent alleged counsel had failed to do] at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely overwhelming ....

Petition for Cert. at app. A230, quoted in 104 S. Ct. at 2052.
\textsuperscript{27} Washington v. State, 397 So. 2d 285 (Fla. 1981) (per curiam).
\textsuperscript{28} Id. at 287.
the outcome of the sentencing hearing, and the court denied Washington's petition.\footnote{See id. (quoting Petition for Cert at app. A285-86).}

Washington appealed to the United States Court of Appeals for the Fifth Circuit. That court held that a defendant must show that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him."\footnote{See id. at 902. The harmless error rule of Chapman v. California, 386 U.S. 18 (1967), is discussed infra notes 93-115 and accompanying text.} Further, the court held that, even if the petitioner meets this burden, the court must examine the error within the framework of the harmless error rule.\footnote{See Washington v. Strickland, 673 F.2d 879, 879 (5th Cir. 1982).} Consequently, the court affirmed in part, vacated in part, and remanded to the district court for consideration in light of its own standard of ineffective assistance of counsel.\footnote{Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. 1982).}

This decision was vacated when the Fifth Circuit decided to hear the case en banc.\footnote{Washington v. Strickland, 679 F.2d 23 (1982) (ordering rehearing en banc).} The full court of appeals developed yet a different standard for ineffective assistance of counsel,\footnote{See Washington v. Strickland, 679 F.2d 23 (1982) (ordering rehearing en banc).} and remanded for consideration in light of its newly enunciated test.\footnote{See Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. 1982).}

C. The Supreme Court Case

Washington subsequently petitioned for certiorari to the Supreme Court. Noting that the various tests, especially the prejudice tests, in the lower courts differed drastically, the Supreme Court granted certiorari\footnote{Strickland v. Washington, 103 S. Ct. 2451 (1983).} "to consider the standards by which to judge a contention that the
Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel.\textsuperscript{38}

The Court in \textit{Strickland v. Washington} began by stating that the purpose of the constitutional requirement of effective assistance of counsel is to "ensure a fair trial."\textsuperscript{39} In the Court's view, a fair trial has been denied where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."\textsuperscript{40} Based upon these premises, the \textit{Strickland} Court enunciated a two-pronged test: first, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."\textsuperscript{41} To satisfy this prong of the test "the defendant must show that counsel's representation fell below an objective standard of reasonableness."\textsuperscript{42} Second, "the defendant must show that the deficient performance prejudiced the defense."\textsuperscript{43} To prove such prejudice, the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."\textsuperscript{44}

\textsuperscript{38} Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984). It is noteworthy that, although the federal court proceedings in \textit{Strickland} were federal habeas corpus proceedings, the majority held that "the principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." \textit{Id.} at 2070.

\textsuperscript{39} \textit{Id.} at 2064. This Comment argues that the Court's assumption is incorrect, for the procedural rights guaranteed by the sixth amendment are to be protected in and of themselves. \textit{See infra} notes 48-80 and accompanying text. It is only through these procedures that a fair trial (i.e. one that does justice) can be achieved. In fact, a fair trial might very well be defined as a trial in which all of an accused's procedural rights have been protected. Thus Justice Marshall wrote, "[T]he constitutional guarantee of effective assistance of counsel . . . functions to ensure that convictions are obtained only through fundamentally fair procedures." \textit{Id.} at 2077 (Marshall, J., dissenting). Similarly, Justice Black wrote, "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (footnote omitted).

\textsuperscript{40} \textit{Strickland}, 104 S. Ct. at 2064.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.} at 2065. This equation of "errors so serious" with an "objective standard of reasonableness" troubled Justice Marshall. In dissent, he noted the majority's suggestion that reviewing courts recognize a strong presumption that counsel's conduct was adequate, \textit{see id.} at 2078 (Marshall, J., dissenting) (citing \textit{id.} at 2065-66), and argued that such a suggestion might be read as imposing upon defendants "an unusually weighty burden of persuasion." \textit{Id.} at 2078 (Marshall, J., dissenting).

\textsuperscript{43} \textit{Id.} at 2064. The Court did, however, note that prejudice is presumed in certain sixth amendment claims, for example, where there was an "[a]ctual or constructive denial of the assistance of counsel altogether" and where counsel was "burdened by an actual conflict of interest." \textit{Id.} at 2067.

\textsuperscript{44} \textit{Id.} at 2068. Unlike the court of appeals below, the Supreme Court did not discuss the harmless error rule of Chapman v. California, 386 U.S. 18 (1967). Appar-
The majority warned that the enunciated standards did not establish "mechanical rules," but were intended to aid in the decision making process. The majority concluded that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Applying these principles, the majority reversed the judgment of the court of appeals, holding that the district court properly declined to issue a writ of habeas corpus.

II. THE SIXTH AMENDMENT AS A PROCEDURAL RIGHT

A. A Just End Depends on Just Means

The Supreme Court in *Strickland v. Washington* places consistent emphasis on one's sixth amendment right to fundamental fairness, which it equates with a just result. The Court’s sixth amendment interpretation is inadequate because it suggests that the end justifies the means in the precise circumstance where the legitimacy of the end is dependent on the legitimacy of the means. One who is clearly guilty, the Court implies, should not be exonerated because counsel was clearly ineffective. The "correct" result is thus elevated above the means by which this result is to be achieved. Such a proposition is in direct conflict with the theoretical basis of the adversarial system: one cannot know the "correct" result without first allowing the process to operate properly. In the adversarial system, the result of a trial in which a defendant has been denied the effective assistance of counsel should have no legitimacy.

The sixth amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and

ently, once a defendant meets the prejudice test, the defendant has shown that counsel’s errors were harmful beyond a reasonable doubt. See *Strickland*, 104 S. Ct. at 2069.

The *Strickland* standard represents the Supreme Court’s attempt to unify the approaches of the lower federal courts and the state courts, which were severely divided on the issue of what constitutes effective assistance of counsel. See, e.g., Maryland v. Marzullo, 435 U.S. 1011, 1011 (1978), denying cert. to 561 F.2d 540 (4th Cir. 1977) (White, J., dissenting) (stating that the circuits were in "disarray" on the question).

*Strickland*, 104 S. Ct. at 2069.

Id.

See id. at 2071.
to have the Assistance of Counsel for his defence.\textsuperscript{48}

Any undertaking to determine the meaning of these words is limited by the lack of a historical record, for "[n]either in the Congress which proposed what became the Sixth Amendment guarantee that the accused is to have the assistance of counsel nor in the state ratifying conventions is there any indication of the understanding which these men brought to the language employed."\textsuperscript{49} Nonetheless, the historical meaning of the sixth amendment is ascertainable through the Framers' statements about the Bill of Rights in general. The Bill of Rights was intended as a \textit{means} of ensuring the "unalienable rights\textsuperscript{50} of individual citizens."\textsuperscript{51} The declaratory and restrictive clauses that comprise the

\begin{itemize}
\item \textsuperscript{48} U.S. CONST. amend. VI.
\item \textsuperscript{49} CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 1215 (1973). Justice Brennan recently criticized "those who find legitimacy in fidelity to what they call 'the intentions of the Framers.'" He argued:
\begin{quote}
We current Justices read the Constitution in the only way that we can: as 20th century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time.

For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.
\end{quote}

\item \textsuperscript{50} These "unalienable rights" were "life, liberty, and the pursuit of happiness." The Declaration of Independence preamble (U.S. 1776).
\item \textsuperscript{51} Although, to be sure, many disagreed with him, see, e.g., 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 436, 445 (2d ed. 1836) (James Wilson believed that a bill of rights is "by no means a necessary measure. In a government possessed of enumerated powers, such a measure would be not only unnecessary, but preposterous and dangerous."), Patrick Henry stated, in arguing for a Bill of Rights, "If you intend to reserve your unalienable rights, you must have the most express stipulation." 3 J. ELLIOT, supra, at 445. Finding that the American people "thought a Bill of Rights necessary," 3 J. Elliot, supra at 317 (statement of Mr. Henry), the first Congress adopted the following resolution: "The conventions of a number of states having at the time of their
Bill of Rights protect these rights.

The sixth amendment, as part of the Bill of Rights, is also a means of protecting the unalienable rights of life, liberty, and the pursuit of happiness. The statements of the Framers support such a conclusion. Patrick Henry said, "Trial by jury is the best appendage of freedom" and supported a jury trial for "its essentiality to the preservation of liberty." Similarly, James Madison, who wrote the words that became the sixth amendment, stated, "Trial by jury . . . is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." But Madison went further in discussing one's right to a jury trial; he included the "other accustomed requisites" of such a right. One of these requisites was the "assistance of counsel for [one's] defence."

Contemporary jurists and commentators have argued that sixth amendment rights, particularly the right to counsel, are vehicles by which substantive constitutional rights are comprehensively protected. For example, Judge Schaefer noted the symbiotic relationship between the right to counsel and other rights: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Similarly, Justice Brennan pointed out that the right to counsel exists "not only to equalize the sides in an adversary criminal process, but also to give substance to other constitutional and procedural protections afforded criminal defendants." Finally, in Powell v. Alabama, the Supreme Court stated, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Thus, the procedural rights of the sixth amendment, in

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1 J. Elliot, supra, at 338.
2 3 J. Elliot, supra note 51, at 324.
3 Id. at 544.
5 Id. at 1029.
6 Id. at 1027.
7 Id. Thomas Paine agreed that "the civil right of pleading by proxy, that is, by a council [sic], is an appendage to the natural right [to plead one's cause]." 1 J. Elliot, supra note 51, at 316.
8 Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956); see also Lakeside v. Oregon, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.").
and of themselves, are the criminal defendant's constitutional guarantee of fairness.

B. The Adversary System Requires Absolute Protection of the Right to Effective Assistance of Counsel

The pronounced commitment of the American legal system to the adversarial process\(^\text{61}\) necessitates a conclusion that procedural rights must be protected in their own right. In particular, the adversarial system fundamentally relies on the effective performance of counsel:

\begin{quote}
[The adversarial] system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible. . . . The judge or jury is given the strongest case that each side can present, and is in a position to make an informed, considered, and fair judgment.\(^\text{62}\)
\end{quote}

\(^{61}\) See, e.g., Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) (calling the adversary system "the fundamental instrument for judicial judgment"); Golding, supra note 4, at 117 ("[T]he adversary system is still the best way of protecting a defendant's procedural rights, or . . . at least a good way of protecting these rights."). Golding also noted, "[T]he adversary system is an efficient method for getting the best answers humanly possible in the trial context, or at least no worse answers than would be gotten through any other method that it would be reasonable to employ at trials."

\(^{62}\) Id. at 108. Some commentators question the adversarial system's efficacy as a method for seeking the "Truth." See, e.g., Frankel, supra note 2, at 1032. The institutional legal system, however, remains committed to the adversarial model and defends its truth seeking methods:

\begin{quote}
[P]roperly directed and purged of obvious abuses, the juxtaposition of two contrary perspectives, the impact of challenge and counter-proof, often discloses to a neutral intelligence the most likely structure of Truth. Thus, at least in those instances . . . where neither side knows certainly the actual contours of a past occurrence, I conclude that the adversarial encounter, for all its hazards, serves as one of the better methods of reconstruction.
\end{quote}

Uviller, The Advocate, the Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea, 123 U. PA. L. REV. 1067, 1067 (1975); see also Barrett, The Adversary System and the Ethics of Advocacy, 37 NOTRE DAME LAW. 479, 480 (1962) (citation omitted). Barrett notes:

\begin{quote}
[T]he truth of the controversy between the parties to a lawsuit stands a reasonably fairer chance of coming out when each side fights as hard as it can to see to it that all the evidence most favorable to it and every rule of law supporting its theory of the case are before the court.
\end{quote}

\textit{Id.} at 480.

Recognition of the fundamental role of effective assistance of counsel in the American legal system underlies the Court's view that a defendant's sixth amendment right to "assistance of counsel" implies a right to "the effective assistance of counsel." As Judge Bazelon wrote, "[T]he Supreme Court recognized that the sixth amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant." For the adversarial system to work properly, a defendant's lawyer must exhibit "entire devotion," "warm zeal," and the "utmost learning" in her client's cause. When an attorney fails to provide such assistance, the sixth amendment is violated because "ineffective representation is the same as no representation at all. Other aspects of the trial that may have mitigated the prejudicial effect of poor representation—for example, a fair and competent judge—are irrelevant since the only issue is whether the defendant was denied a fundamental sixth amendment right.

The mere presence of counsel at trial satisfies neither the goals of the adversary system nor, more importantly, the requirements of the sixth amendment. As the Supreme Court held in Avery v. Alabama, a case involving a challenge to the effectiveness of appointed counsel:

[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot

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63 McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). The right to effective assistance of counsel is generally traced to Powell v. Alabama, 287 U.S. 45 (1932), where the Supreme Court held that a court's duty to appoint counsel "as a necessary requisite of due process of law . . . is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Id. at 71 (emphasis added). The Court in Powell based this conclusion on the fact that "the defendants did not have the aid of counsel in any real sense." Id. at 57. Thus, the Court wrote in McMann, "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." 397 U.S. at 771 n.14 (citing cases collected supra note 9). The Court in Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984), accepted this conclusion.

64 Bazelon, The Realities of Gideon and Argersinger, 64 Geo. L.J. 811, 818-19 (1976); see also Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command.").

65 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 15 (1980); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

be satisfied by mere formal appointment.\textsuperscript{67}

Formal compliance with the Constitution, without active representation of a client’s interests, is as much a violation of a sixth amendment procedural right as the denial of any assistance at all.\textsuperscript{68}

In his dissenting opinion in \textit{Strickland}, Justice Marshall interpreted the majority’s holding to imply “that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney.”\textsuperscript{69} Such a standard, which “results in no reversal for ineffective assistance in cases of ‘overwhelming guilt[,]’ does not fulfill the basic requirement of a working adversary model—a fair contest between equals.”\textsuperscript{70} Simply stated, an appellate court’s determination that a defendant is “clearly guilty” cannot act as a substitute for a trial that has failed to establish guilt through fair procedures.\textsuperscript{71}

As Judge Bazelon noted, this “guilty anyhow” syndrome “has played a major role in perpetuating ineffective representation”\textsuperscript{72} for it allows reviewing courts to excuse acts and omissions by counsel “with the magic words ‘tactical decision,’ without inquiring as to whether the lawyer even thought about the problem, or whether his thinking was informed by a knowledge of the relevant law and facts.”\textsuperscript{73} In other words, the difficult burden of proving prejudice that the Court in \textit{Strickland v. Washington} places on the defendant allows a court to sweep attorney incompetence under the rug of a conviction that was affirmed because a defendant could not prove prejudice. The attorney’s incompetence is quietly forgotten. As one commentator noted, “It is always possible in retrospect to fashion a justification for the failure to perform a certain act when the defendant appears to be factually guilty.”\textsuperscript{74} The Court in \textit{Strickland} exemplifies the willingness to sacrifice the requirements of the sixth amendment to the desire to protect

\textsuperscript{67} 308 U.S. 444, 446 (1940).

\textsuperscript{68} See Reece v. Georgia, 350 U.S. 85, 90 (1955) (“The effective assistance of counsel . . . is a constitutional requirement of due process of law.”).


\textsuperscript{70} Babcock, \textit{Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel}, 34 STAN. L. REV. 1133, 1166 (1982).

\textsuperscript{71} See also W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 26.6(b) at 262 (1984) (A result-oriented test converts an appellate court into the trier of fact and fails to recognize that the defendant has a right to a fair trial even when he is clearly guilty.).

\textsuperscript{72} Bazelon, \textit{supra} note 64, at 825.

\textsuperscript{73} Id. at 828.

the tactical decisions of lawyers.

To be sure, an attorney must not be hindered in her planning of trial strategy. As Justice Marshall noted in his dissent in *Strickland*, however, the majority's requirements that reviewing courts "indulge a strong presumption that counsel's conduct" was constitutionally adequate" and that "judicial scrutiny of counsel's performance must be highly deferential" suggest the imposition upon defendants of "an unusually weighty burden of persuasion." Lawyers, who frequently must make tactical decisions, may in fact occasionally make poor ones. If these inadequate decisions deny a defendant the effective assistance of counsel, the defendant is denied a basic guarantee of the adversarial system, which is theoretically the protector of fair trials. If the adversarial system has failed to function properly the sixth amendment requires reversal, regardless of the effects on the crowded docket of the courts.

III. The *Strickland* Test's Emasculation of the Sixth Amendment

A. Incorporation Should Not Diminish the Protections of the Sixth Amendment

The theory that subordinates the explicit procedural right of assistance of counsel to the substantive "right" to a fair trial can be traced

76 *Id.* at 2065.
76 *Id.* at 2078 (Marshall, J., dissenting).
78 See Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 22-23 (1973) ("I have often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction.").
76 See Bazelon, supra note 64, at 823. Judge Bazelon argues, "Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability." *Id.* at 822-23. Rather, "[t]he concern is simply whether the adversary system has functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel." *Id.* at 823. This framing of the issue obviates a concern for the integrity of the lawyering profession because it shifts the emphasis from the attorney's general competence to the attorney's behavior in a specific set of circumstances and that behavior's effect on the adversarial process.
80 *See id.* at 821 ("[I]f the courts gave the sixth amendment real bite, we judges would have to swallow the bitter pill of reversing an uncomfortably large number of convictions and releasing large numbers of defendants from their guilty pleas. Even if reversals and releases would not be that frequent, the spectre of a flood of frivolous ineffectiveness claims haunts many judges.").
81 *Strickland v. Washington*, 104 S. Ct. 2052, 2063 (1984) ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").
to the incorporation of most of the Bill of Rights into the due process clause of the fourteenth amendment. The due process protection of the right to counsel focuses on the defendant's right to "fundamental fairness" in the result. The sixth amendment right, on the other hand, is a "procedural guarantee to which an ad hoc balancing of interests is inappropriate." The purpose of incorporating the sixth amendment into the fourteenth amendment was to make the amendment applicable to the states. It does not require, suggest, or even allow for

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82 As the Supreme Court held in Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)), the fourteenth amendment "embraced" the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,... although [they were] specifically dealt with in another part of the Federal Constitution." Since the rights contained in the Bill of Rights have been held to be of this fundamental nature, see, e.g., Gitlow v. New York, 268 U.S. 652, 664 (1925) (fourteenth amendment incorporates first amendment freedoms of speech and press); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 235-41 (1897) (incorporation of the fifth amendment just compensation requirement), they have been incorporated into the due process clause of the fourteenth amendment. The result of this incorporation is that a defendant's right to counsel is protected under the due process clauses of the fifth and fourteenth amendments as well as under the sixth amendment.

Although the sixth amendment guarantees the procedural right of counsel for one's defense, the due process clauses have extended the content of "defense" beyond the scope of the trial proper. See, e.g., Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel at preliminary hearing); White v. Maryland, 373 U.S. 59 (1963) (right to counsel at arraignment); Townsend v. Burke, 334 U.S. 736 (1948) (right to counsel at sentencing stage). These decisions were based on dicta in Powell v. Alabama, 287 U.S. 45, 57 (1932): "[D]uring perhaps the most critical period of the proceedings..., that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants...[are] as much entitled to such aid [of counsel] during that period as at the trial itself."

83 Note, A Functional Analysis of the Effective Assistance of Counsel, 80 COLUM. L. REV. 1053, 1054-55 (1980). Thus, in Betts v. Brady, 316 U.S. 455 (1942), overruled by Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court, holding that the fourteenth amendment did not incorporate the sixth amendment, noted that a defendant's due process right to counsel is violated only where "the totality of facts in a given case" suggest that the denial of counsel "constitute[s] a denial of fundamental fairness..." The Betts Court further noted that "[t]he phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." Id.

84 Note, supra note 83, at 1056 (footnote omitted). Various commentators thus have argued that the procedures enunciated in the sixth amendment should be goals in and of themselves. See id. at 1069 ("The Sixth Amendment's right to counsel... seeks to preserve procedural rights in the criminal context.") (footnote omitted); Note, supra note 74, at 767 (The overall concern of the adversary system for fairness "sometimes dictates that a guilty verdict be overturned, notwithstanding overwhelming evidence of guilt, because the procedure for obtaining that verdict was unfair. This is one rationale behind the exclusionary rule, for example.") (footnote omitted). But see W. LAFAVE & J. ISRAEL, supra note 71, § 11.10(a) at 94 ("The adversary process, it is argued, is not a goal in itself, but a means adopted to best achieve the basic objective of a fair fact-finding process that protects the innocent.").

judicial modification or erosion of the amendment's protections.

The sixth amendment lists specific ingredients that, in combination, constitute a fair or reliable trial. It is questionable, then, whether a fair or reliable trial can be achieved when one of these ingredients is missing. In other words, one must ask whether the sixth amendment protects absolutely the procedural rights that its language sets forth, or whether it protects the substantive "right" to a fair trial that these procedural rights collectively create.

By incorporating the sixth amendment into the fourteenth amendment right to fundamental fairness, the Court has permitted the elimination of the counsel ingredient. Such an approach has been strongly criticized. In his dissent in *Gilbert v. California*, Justice Black wrote:

The Framers did not declare in the Sixth Amendment that a defendant is entitled to a "fair trial," nor that he is entitled to counsel on the condition that this Court thinks there is more than a "minimal risk" that without a lawyer his trial will be "unfair." The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair . . . .

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86 Cf. J. ELY, DEMOCRACY AND DISTRUST 13 (1980) ("Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured.").

87 See United States v. Agurs, 427 U.S. 97, 108 (1976) ("[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."); United States v. Wade, 388 U.S. 218, 226 (1967) ("[C]ounsel's absence might derogate from the accused's right to a fair trial."); Estes v. Texas, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring) ("[T]he public trial provision of the Sixth Amendment is . . . a necessary component of an accused's right to a fair trial . . . ."); see also Evitts v. Lucey, 105 S. Ct. 830, 836 (1985) (Counsel is required "to assist the defendant to obtain a fair decision on the merits."); Strickland v. Washington, 104 S. Ct. 2052, 2067 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."); United States v. Cronic, 104 S. Ct. 2039, 2046 (1984) ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."); Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (sixth amendment right to counsel fundamental to a fair trial).


89 See W. LAFAVE & J. ISRAEL, supra note 71, § 11.7(c), at 67 n.22 ("Commentators have argued that this emphasis upon the totality of the circumstances reflects a failure of the courts to recognize that ineffectiveness claims in a post-*Gideon* era are based upon the Sixth Amendment right to counsel rather than the 'fundamental fairness' analysis of pre-*Gideon* due process.") (citing Note, supra note 83, at 1054-69 and Note, Ineffective Assistance of Counsel: The Lingering Debate, 65 CORNELL L. REV. 659, 671-72 (1980)); see also Note, supra note 74, at 752 ("[T]he defendant has a constitutional right to adequate procedural safeguards.").
I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall . . . have the Assistance of Counsel for his defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial." 90

The incorporation of the sixth amendment into the due process clause of the fourteenth amendment has enabled courts to develop a balancing framework which, in effect, has been used to dilute the guarantee of effective assistance of counsel.

Justice Black has also noted:

The Court considers the "right to a fair trial" to be the overriding "aim of the right to counsel," . . . and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a "fair trial." But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. 91

The remedy for this apparent dilemma sounds almost too simplistic: by protecting the explicit procedural right to counsel enunciated in the sixth amendment, fairness is achieved and the requirements of both the sixth and fourteenth amendments are satisfied. 92 There is no tension

90 388 U.S. 263, 279 (1967) (Black, J., concurring in part and dissenting in part) (citations omitted). Golding states:

"[I]n respective of whether a trial aims at truth discovery or something else, justice requires that the parties be given a fair trial of their cause. This means that the rights, especially the procedural rights, of the litigant or defendant should be protected throughout the proceedings . . . . [T]he adversary system is a necessary ingredient in a fair trial; a fair trial is an adversarial trial.

Golding, supra note 4, at 116.

John Hart Ely has adopted such a view, albeit in stronger language than that of Justice Black. Ely rejects the view that the due process clause of the fourteenth amendment protects a substantive right such as the right to a fair trial. Ely argues, "There is simply no avoiding the fact that the word that follows 'due' is 'process.' No evidence exists that 'process' meant something different a century ago from what it does now . . . ." J. ELY, supra note 86, at 18. It follows, then, that the "proper function of the Due Process Clause [is the] guaranteeing [of] fair procedures." Id. at 19.


92 One commentator argues that the substantive component provided by the due process clause is not the right to a fair trial, but rather a substantive right to effective
between preserving the procedural right and allowing the due process clause to operate fully.

B. Prejudice—An Incorrect Inquiry

The procedural rights protected by the sixth amendment are consistent with the interest in fair trials protected by the due process clauses of the fifth and fourteenth amendments only where a fair trial is defined by the procedures expressed in the sixth amendment. The Court in *Strickland* adopted such a view: "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . ."98 The Court in *Strickland* properly adopted a standard for ineffective assistance that focuses on the procedural aspects of a trial: counsel's representation must not fall "below an objective standard of reasonableness."94 Having adopted such a standard, the Supreme Court paradoxically added a result-oriented prejudice test that would allow a reviewing court to hold a trial fair even after a defendant showed a denial of the effective assistance of counsel.

The Court in *Strickland* noted that the issue in a sixth amendment case is whether the *procedure* was fair—that is, "whether the defendant was denied a fundamental sixth amendment right"95—and not whether the outcome of the proceeding was fair. As one commentator argued, since the sixth amendment "seeks to preserve procedural assistance of counsel:

[All] formulations of the right [to effective assistance of counsel] are an amalgam of two characterizations, one procedural or dignitary, the other substantive. The procedural characterization endows the right to effective assistance of counsel with an abstract importance, independent of the impact of the infringement of that right on the reliability of the verdict; the substantive characterization of the right views it as concerned only with the impact of ineffective counsel on the outcome of the trial.


The commentator's own definitions of the procedural and substantive rights are contradictory. It is difficult to understand how any amalgam of rights can comprise a single right to effective assistance of counsel. Any such amalgam would permit a judge to focus on the impact of the outcome of a trial in one case and on the procedural right, with its "abstract importance" in the next. Such an argument would actualize Justice Black's fears of a court balancing away a defendant's rights. See supra notes 90-91 and accompanying text.

94 Id. at 2065.
95 Smithburn & Springmann, *supra* note 66, at 503.
rights in the criminal context, courts should determine whether a defendant has received effective assistance "without regard to the fairness or reliability of the proceedings as a whole." Another commentator has made a similar argument by relying on the due process clause: "Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes which ensure regard for the dignity of the individual be followed, irrespective of their impact on the determination of truth." The prejudice inquiry, which the Court appears to deem the true determinant of whether a trial is fair, is inappropriate in the context of defining a defendant's sixth amendment rights.

Even if a prejudice requirement is justifiable, placing the burden of proving prejudice on the defendant is inappropriate for two reasons. First, placing the burden of proving prejudice on the defendant, as the Strickland Court has done, reverses the usual presumption that a defendant is innocent until proven guilty. In United States v. DeCoster [DeCoster I] the Court of Appeals for the District of Columbia noted:

A requirement that the defendant show prejudice . . . shifts the burden [of proving his case] to him and makes him establish the likelihood of his innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial.

In general, where a defendant appeals the conviction, the defendant has the burden of proving the claim. The defendant has had her "day in court." This assumes, however, that the defendant's day in court was a meaningful one—one that included "effective assistance of counsel on that day."

To presume that a defendant is guilty before the defendant has been convicted through the properly functioning procedures guaranteed by the sixth amendment is to undermine the fair adversarial trial that the Court in Strickland purports to protect. Thus, assuming that a

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96 Note, supra note 83, at 1069.
97 Id.
98 Freedman, supra note 62, at 1065.
100 Id. at 1204.
101 Bazeon, supra note 78, at 27.
102 Id.
103 The Court in Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984), stated:
prejudice test was justifiable, where a convicted defendant shows that her attorney failed to provide effective assistance of counsel, the defendant has been denied a fair trial and the conviction must be presumed invalid unless the prosecution "can show beyond a reasonable doubt why it should not be."\textsuperscript{104} Holding otherwise would be to require a defendant to prove that the prosecution has failed to prove its case, a notion contrary to a system of justice that requires the prosecution to prove every element of that case.\textsuperscript{105}

Second, still assuming that a prejudice requirement could be justified in effective assistance of counsel cases, placing the burden of proving prejudice on the defendant, as the Supreme Court has done in \textit{Strickland}, effectively shifts the burden of proving harmless error from the state to the defendant. In \textit{Chapman v. California},\textsuperscript{106} the Supreme Court held that, although some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error,"\textsuperscript{107} "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."\textsuperscript{108} Proof of a constitutional error, however,

casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.\textsuperscript{109}

The court of appeals in \textit{Strickland} stated that the purpose of placing the harsh burden of proof established by \textit{Chapman} on the state was "to prevent the state from benefitting from its own wrongs."\textsuperscript{110} Since the violation in an ineffective assistance of counsel case "is not caused

\textsuperscript{105} Note, \textit{supra} note 74, at 770.
\textsuperscript{106} 386 U.S. 18 (1967).
\textsuperscript{107} Id. at 23 & n.8 (citing right to counsel guarantee of Gideon v. Wainwright, 372 U.S. 335 (1963), as an example of error that may never be deemed harmless).
\textsuperscript{108} Id. at 22.
\textsuperscript{109} Id. at 24 (citation omitted).
by the state,”111 the court noted that “the same equitable and deterrent function” of the harmless error rule is not served.112 This is a misreading of Chapman. The Chapman harmless error rule was not intended merely as a deterrent. Rather, it represented an attempt to reach a just result while protecting the “‘substantial rights of the parties.’”113 Thus, the fact that the state did not cause the error is irrelevant. Assuming that the harmless error doctrine should apply to sixth amendment violations, “the issue is not whether the state or the defendant was responsible for defense counsel’s actions, but whether the defendant’s sixth amendment right to effective counsel was violated.”114 Chapman holds only that “the beneficiary of the error[,]” that is “someone other than the person prejudiced by it[,]” bears the burden of showing that the error was harmless.115 If a showing of prejudice is to be required at all, the Court in Strickland erred in placing the burden on the defendant, since this, in effect, requires the defendant to prove her innocence.

G. The Impossibility of Proving that a Jury Would Have Reached a Different Result

The prejudice requirement enunciated in Strickland is also unworkable on a practical level. Strickland requires a defendant to prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”116 This is an outcome-determinative test that assumes one can determine what the result would have been had effective assistance of counsel been provided. Such an assumption rejects the reasoning upon which Gideon v. Wainwright is based.117 One commentator provides a

111 Id. The implication is that ineffective assistance of counsel is a different type of procedural violation than, for example, an illegal search, since in the latter the state is responsible for the violation.

112 Id. at 1260.

113 386 U.S. at 22 (citing 28 U.S.C. § 2111 (1982)). The Court in Chapman noted that the California State Constitution forbade reversal unless “‘the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’” 386 U.S. at 20 (citing CAL. CONST. art VI, § 4½). The Court also noted that the federal statute forbade reversal for “‘errors or defects which do not affect the substantial rights of the parties.’” Id. at 22 (citing 28 U.S.C. § 2111 (1982)).

114 Note, supra note 104, at 1402. This commentator further noted, “[I]t appears illogical to charge the defendant with responsibility for the acts of his attorney; he is not in a position to oversee his attorney's performance knowledgeably.” Id. See also Brescia v. New Jersey, 417 U.S. 921, 926 (1974) (Marshall, J., dissenting from denial of petition for cert.) (“No matter upon whose doorstep the judge cared to lay blame for counsel's lack of preparation, the cost of the failure should not have been visited upon the defendant—who was without responsibility.”).

115 386 U.S. at 24 (citation omitted).


clear example of the virtual impossibility of proving that a jury probably would have reached a different result\footnote{118} by discussing two cases with substantially similar facts.\footnote{119} In \textit{People v. Jackson}, the defendant's ninety-year old grandmother was present at the trial every day.\footnote{120} The grandmother raised the defendant after his parents had abandoned him.\footnote{121} The evidence showed that she loved and believed in him,\footnote{122} knowing that his parents cruelly rejected him.\footnote{123} Though the grandmother's testimony was likely to elicit a sympathetic response from the jury, defense counsel refused to permit her to testify.\footnote{124} The jury sentenced the defendant to death. In the unreported case of \textit{Bernadino Sierra},\footnote{125} defense counsel allowed various relatives to testify. In particular, the defendant's son, "a beautiful little boy, got on the stand and told the jury, 'That's my father.' And the lawyer asked him, 'What's the jury going to decide?' 'Whether he lives or whether he dies,' said the little boy."\footnote{126} \textit{Jackson} involved two killings and burglaries, and the jury sentenced the defendant to die. \textit{Sierra} involved three killings, two maimings, and twelve robberies. The jury spared Sierra's life.\footnote{127}

On very similar facts, juries reached opposite conclusions. If any conclusion may be deemed "reasonably probable," it is that Sierra, whose crimes were more heinous than those committed by Jackson,
would not have received the more lenient sentence. Proof of a reasonable probability that the result would have been different is virtually impossible since jurors' decisions are based on an infinite variety of subjective data, and one can rarely, if ever, state that it is reasonably probable that a jury would have reached a different result than it did. Thus, when a defendant has been convicted in a trial in which the effective assistance of counsel was lacking, the conviction must be overturned, even where the evidence of guilt is overwhelming. The question of prejudice is inappropriate in the context of a violation of a defendant's sixth amendment rights.

Such a conclusion may strike some as extreme. Why should a court allow a clearly guilty defendant to escape conviction? First, such a defendant does not escape conviction, but rather receives a new trial. Second, in an adversarial system, one is never "clearly guilty" until one has been convicted through fair procedures. Stated more simply, one is innocent until proven guilty, and guilt or innocence must be determined in a constitutionally adequate trial.

IV. A More Appropriate Test

A. The Hybrid Test

Two predominant schools of thought exist among the courts and commentators as to the correct standard of proof for a claim of ineffective assistance of counsel: the "categoricalists" and the "judgmentalists." Judge Leventhal noted in United States v. DeCoster [DeCoster II](DeCoster II), 624 F.2d 196, 291 (D.C. Cir. 1976) (Bazelon, J., dissenting).

128 Justice Marshall objected on this ground in his dissent in Strickland: "[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent." 104 S. Ct. 2052, 2076 (1984) (Marshall, J., dissenting).

129 As two recent commentators have noted, "Ineffective representation is the same as no representation at all." Smithburn & Springmann, supra note 66, at 503; see also R. Traynor, Jr., THE RIDDLE OF HARMLESS ERROR 57 (1970) (implying that the Supreme Court has rejected any difference between the right to counsel and the right to effective assistance of counsel) (citing Hamilton v. Alabama, 368 U.S. 52 (1961); Uveges v. Pennsylvania, 335 U.S. 437 (1948); House v. Mayo, 324 U.S. 42 (1945); Williams v. Kaiser, 323 U.S. 471 (1945)). Various courts have also noted this proposition. See, e.g., United States v. Yelardy, 567 F.2d 863, 865 n.1 (6th Cir.), cert. denied, 439 U.S. 842 (1978); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); Commonwealth v. Badger, 482 Pa. 240, 243-44, 393 A.2d 642, 644 (1978).

130 Note, supra note 74, at 767.

131 "The presumption of innocence that cloaks the accused cannot be stripped by a conviction obtained in something less than a constitutionally adequate trial." United States v. DeCoster (DeCoster III), 624 F.2d 196, 291 (D.C. Cir. 1976) (Bazelon, J., dissenting) (footnote omitted).

132 See id.

133 W. LaFAVE & J. ISRAEL, supra note 71, at § 11.7(c).
that the principal distinction between the two approaches stems "from the courts' perceptions of the exactness with which a denial [of effective assistance] can be identified and remedied, as well as their views of the need for a showing of prejudice." Although most courts have chosen one approach or the other in defining a standard of ineffective assistance, Judge Leventhal, writing for the court in Decoster III, held that the two standards represent the extremes of a continuum. Judge Leventhal explained that in cases of "structural or procedural impediments by the state that prevent the accused from receiving the benefits of the constitutional guarantee," the categorical approach would apply. The failure of a state to appoint counsel to an indigent defendant, thereby denying her of any counsel whatsoever, is the clearest example of such a procedural impediment. A violation of that right is prejudicial per se and requires immediate reversal.

At the other extreme of Judge Leventhal's continuum are cases in which a claim of ineffective assistance is based, not on any state action, but rather on actions or omissions by defense counsel. These cases, he argues, are not amenable to resolution by categorical approaches:

The defense attorney's function consists, in large part, of the application of professional judgment to an infinite variety of decisions in the development and prosecution of the case. A determination whether any given action or omission by counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel's judgment.

This type of situation, which calls for a case-by-case factual inquiry

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134 624 F.2d 196 (D.C. Cir. 1976).
135 Id. at 200.
136 See id. at 201.
137 Id.
138 See id.
139 See id. It is also noted:

Under the categorical approach, certain actions by counsel are assumed to be essential to effective representation, and counsel's failure or inability to take such action therefore automatically establishes constitutional error. That error ordinarily will be treated as a per se basis for reversal of a defendant's conviction, although some supporters of the categorical approach would modify it to permit a harmless error exception for certain types of ineffectiveness claims.

W. LaFave & J. Israel, supra note 71, at § 11.7(c).
140 Decoster III, 624 F.2d at 202.
141 See id.
142 Id. at 203; see also Note, supra note 74, at 766 ("It is true that there is some need for flexibility in the application of appellate standards. The special facts of each case and the strength of the prosecution's case naturally determine to some extent what an effective attorney will do.").
into the performance of counsel, is not amenable to categorical rules.

Although a variety of commentators and jurists have argued for the adoption of a categorical approach,\textsuperscript{143} few courts have adopted such an approach.\textsuperscript{144} Because each attorney is different and each trial situation is unique, categorical rules are deemed inappropriate.\textsuperscript{145} Thus, most courts have accepted the judgmental notion that claims of ineffectiveness of counsel must be judged on a case-by-case basis, focusing on the totality of the circumstances.\textsuperscript{146}

This Comment has argued that the judgmental approach to ineffective assistance cases adopted by the Court in \textit{Strickland v. Washington-}

\begin{footnotesize}
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\item See, \textit{e.g.}, Note, \textit{supra} note 74, at 767-70. Judge Bazelon has been a strong proponent of the categorical approach:

[Counsel] . . . must confer with his client without delay and as often as necessary to elicit matters of defense, discuss fully potential strategies and tactical choices with his client, properly advise his client of his rights and take all actions necessary to preserve them, and conduct appropriate investigations, both factual and legal. Precisely because these rules are so elementary, no one can dispute that a 'reasonable' lawyer, absent good cause, would comply with them. Bazel\textit{on, supra} note 64, at 823 (citations omitted); \textit{see also DeCoster III, 624 F.2d at }304-06 (Bazelon, C.J., opinion on remand) (arguing for categorical approach to be guided by the ABA Standards for the Defense Function (ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE §§ 4-1.1 to -8.6 (Tent. Draft 1979))).

\item W. \textsc{Lafave} & J. \textsc{Israel}, \textit{supra} note 71, at § 11.7(c). Those who support the categorical approach generally contend that the American Bar Association Standards for the Defense Function provide appropriate rules. \textit{See supra} note 143. Various courts have held, however, that the imposition of ABA standards would affect the adversary system by interfering with the defense function. \textit{See, e.g.}, \textit{Estelle v. Williams, 425 U.S. 501, 512 (1976)} (holding that once a defendant has the assistance of counsel "the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system."). One commentator found two flaws in the argument that standards would interfere with the adversary system:

First, the adversary system presumes attorney competence. If defense counsel incompetence renders that assumption false, the structure of the system is jeopardized. Categorical rules to upgrade attorney performance may help ensure the presence of effective adversaries . . . . Second, society has an interest in the criminal process beyond preserving the institutional structure and guaranteeing accuracy of result. If fairness in the adjudication of criminal guilt were not a paramount concern, inquisition of the obviously guilty would be sufficient. This concern sometimes dictates that a guilty verdict be overturned, notwithstanding overwhelming evidence of guilt, because the procedure for obtaining the verdict was unfair. This is one rationale behind the exclusionary rule, for example. \textit{Note, supra} note 74, at 767 (footnotes omitted).

\item See \textit{supra} note 142 and accompanying text.

\item See, \textit{e.g.}, W. \textsc{Lafave} & J. \textsc{Israel}, \textit{supra} note 71, at § 11.7(c) ("Counsel's action or inaction as to a particular matter must be judged in the context of his total representation . . . . ").
\end{enumerate}
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ton fails to meet the requirements of the sixth amendment. The categorical approach, requiring rigid rules for attorney behavior at trial, is also inadequate. Although a reviewing court cannot smother a defendant’s sixth amendment rights in a veil of tactical decisions by defense counsel, the Court in *Strickland* makes a strong point in noting, “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Categoricalists are correct, however, in arguing that, once a defendant proves that counsel was constitutionally ineffective, the defendant need not show prejudice.

Thus, this Comment suggests a hybrid approach. First, as in the judgmental approach, a defendant must prove that counsel failed to make decisions that were objectively reasonable in light of all of the circumstances of the case. An objectively reasonable decision is one that is commensurate with the prevailing notion of a competent attorney. Courts have applied this “range of competence” standard and have found it to be a viable means of determining effectiveness of representation. Second, as in the categorical approach, once a defendant meets the burden of proof with respect to counsel’s actions, the defendant need not prove more. The denial of the effective assistance of counsel is prejudicial per se.

Any assessment of attorney competence must occur in the context of the adversary system:

On any theory of the adversary system the lawyers should be competent in the law and in trial skills. One may be inclined to go further and say that if a trial is to be fair, the lawyers should be equal in competence, or at least not too disparate in respect to competence. When either of these conditions of competence or rough equality of competence is not met, the judge will be faced with a serious problem regarding procedural justice.

Unfortunately, the ideal world of equally competent attorneys does not

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147 See supra notes 143-45 and accompanying text.
149 See, e.g., Marzullo v. Maryland, 561 F.2d 540, 543-44 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (discussing the range of competence demanded of attorneys in criminal cases); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (“normal competency: the exercise of the customary skill and knowledge which normally prevails at the time and place”); Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967) (“gross incompetence of counsel . . . has in effect blotted out the essence of a substantial defense”).
150 Golding, supra note 4, at 115.
exist. Consequently, the goal must be to ensure that opposing litigants have counsel who are as nearly equal in competence as possible. The proposed reasonableness test, under which an attorney's decisions must be judged in light of the prevailing notion of a competent attorney, is directed at such a result. This test is appropriate for two reasons. First, it recognizes that lawyers are professionals and should be judged by the same standards that courts have used to judge other professionals.\textsuperscript{151} If a judge is competent to determine whether a professional other than a lawyer acted reasonably, she is certainly capable of determining whether a lawyer acted reasonably.\textsuperscript{152} Second, this test adequately protects reasonable tactical decisions. Responding to the Court's admonition in \textit{Strickland} that "every effort be made to eliminate the distorting effects of hindsight,"\textsuperscript{153} this test asks not whether an attorney's decisions were correct but rather whether they were objectively reasonable under all the circumstances.

Once a defendant proves that counsel was constitutionally ineffective, the defendant need not prove prejudice. To do so would presume a defendant to be guilty although the defendant had never been proven guilty through proper procedures. Nor should the state be permitted to prove harmless error. To do so would be to propose that a trial, which is by definition unfair, can be accepted as fair.\textsuperscript{154} The Court in \textit{Chapman v. California} noted that certain constitutional violations, including the denial of the right of counsel, can never be deemed harmless.\textsuperscript{155} As

\textsuperscript{151} W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON \textbf{THE LAW OF TORTS} 185-86 (5th ed. 1984) (footnotes omitted) states:

Professional persons in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a standard minimum of special knowledge and ability. Most of the decided cases have dealt with surgeons and other doctors, but the same is undoubtedly true of dentists, pharmacists, psychiatrists, veterinarians, lawyers... architects and engineers... and many other professionals and skilled trades.

\textsuperscript{152} In discussing the irony of judges holding other professionals to a reasonableness standard while applying the less stringent "gross incompetence" or "mockery of justice" standards in effective representation cases, Judge Bazelon noted: "Judges who never would even think to apply these tests [i.e. variety of ineffective assistance tests] to other professions have ignored gross incompetence among lawyers. Who would be content with their doctor because he did not make a mockery of medicine, or was not grossly incompetent?" Bazelon, supra note 64, at 819 (footnote omitted).


Arguably, a plausible justification for the harmless error rule is the courts' concern with severely crowded dockets. Such a justification indicates that where a court applies the harmless error doctrine, the court does not deem an unfair trial fair, but rather it deems an unfair trial a necessary evil: unfair but acceptable under all of the circumstances.

the Court noted in *Strickland*, the denial of the effective assistance of
counsel is equivalent to the denial of any counsel.\textsuperscript{156} Thus, the denial of
the effective assistance of counsel should never be deemed harmless.

\textbf{B. Judicial Economy at What Cost?}

Although ensuring that the efficient administration of criminal jus-
tice and the integrity of final judgments are proper interests for a court
to consider, they should not be determinative considerations when the
judgment sought to be preserved is unfair at the outset.\textsuperscript{157} The Court in
*Strickland* placed particular emphasis on both of these concerns. First,
the Court stated that allowing for too intrusive a post-trial inquiry into
counsel’s assistance “would encourage the proliferation of ineffectiveness
challenges.”\textsuperscript{158} Even if this were true, it must be viewed as an
unfortunate but necessary result of giving the sixth amendment “real
bite.”\textsuperscript{159} Where a defendant has been denied effective assistance of
counsel, the trial was not a fair one, and the conviction must be over-
turned. Second, the Court in *Strickland* noted the presumption that a
criminal judgment is final.\textsuperscript{160} As efficiency concerns should not deny a
defendant a fair trial, neither should concerns for finality. An unjust
conviction cannot be upheld solely in the interest of the finality of the
proceeding, for the ultimate goal of a criminal justice system is to do
justice in all cases.

Implicit in the Court’s emphasis in *Strickland* on efficiency and
finality is the notion that a test that protects absolutely a defendant’s
right to effective assistance of counsel would be untenable or, at best,
impractical.\textsuperscript{161} Experience shows otherwise, for courts have successfully

show that the counsel made errors so serious that she was not functioning as the coun-
sele guaranteed by the sixth amendment.

\textsuperscript{157} Note, supra note 74, at 769.


\textsuperscript{159} Bazelon, supra note 64, at 821. In fact, a more stringent standard might, in
the long run, prove to be a more effective way of meeting the concerns of the Court in
*Strickland*. “[C]larifying the requirements for defense counsel might well reduce the
number of ineffectiveness claims by informing defendants and lawyers alike as to what
is expected of counsel. In any event, such clarification would make it easier for courts to
separate frivolous from nonfrivolous ineffectiveness issues.” Id. at 822.


\textsuperscript{161} Writing for the Court in *Strickland*, Justice O’Connor stated:

The availability of intrusive post-trial inquiry into attorney performance
or of detailed guidelines for its evaluation would encourage the prolifera-
tion of ineffectiveness challenges. Criminal trials resolved unfavorably
to the defendant would increasingly come to be followed by a second trial,
applied standards like those proposed by this Comment to distinguish unreasonable from reasonable attorney conduct. For example, courts have found defense counsel's conduct to be unreasonable where counsel did not participate at all at trial, choosing instead to stand mute, where counsel did not interview any witnesses, and where counsel failed to conduct any investigation into the client's only possible defense or into a potentially fruitful line of defense. On the other hand, courts have found defense counsel's actions reasonable where defense counsel refused to file affidavits of proposed testimony because to do so would create the risk of a perjury charge against the client and alert the prosecution to matters helpful to the prosecution on retrial.

The test proposed by this Comment also enables judges to decide cases with results as clear as the cases noted above. For example, in Easter v. Estelle, the defendant claimed that counsel's failure to interview and subpoena certain witnesses constituted a denial of effective assistance of counsel. This case is more difficult than the situation in which counsel interviews no witnesses at all. The court found counsel's actions reasonable, noting that the course of action suggested by the defendant would have "opened the door to the introduction of [defendant's] prior conviction for child molestation" and, consequently, would have weakened the defense.

See, e.g., United States v. Baynes, 687 F.2d 659, 668 (3d Cir. 1982) (where government's entire case rested on an intercepted phone conversation and where government's chief piece of evidence was a voice exemplar of defendant's voice, defense counsel's failure to listen to the voice exemplar, a course of action which might have produced exculpatory evidence, constituted ineffective assistance of counsel); Gomez v. Beto, 462 F.2d 595, 597 (5th Cir. 1972) (where defendant notified defense counsel of various alibi witnesses and where defendant's alibi was his only line of defense, defense counsel's failure to investigate into these alibi witnesses constituted ineffective assistance of counsel).

Gaines v. Hopper, 575 F.2d 1147, 1148 (5th Cir. 1978) (per curiam) (where defendant informed defense counsel that the murder of which he was accused was provoked, failure of defense counsel to investigate this claim constituted ineffective assistance of counsel).


609 F.2d 756, 759 (5th Cir. 1980).

Id.
Carbo v. United States\textsuperscript{169} provides another example of a difficult case that could be managed capably using the standard proposed by this Comment. In Carbo, the defendant claimed that he was denied the effective assistance of counsel because counsel was appointed on the day of the guilty plea and was given only five minutes to discuss the case with the defendant.\textsuperscript{170} The defendant argued that, in light of these facts, counsel could not have been adequately prepared.\textsuperscript{171} The Carbo court rejected the defendant’s claim after analyzing the particular setting of the case. Noting that in the context of a guilty plea, defense counsel need only ensure that the plea was entered “voluntarily and knowingly,”\textsuperscript{172} the court held that the time counsel expended on the case was sufficient.\textsuperscript{173}

The test proposed in this Comment provides a viable alternative to the Strickland test for claims of ineffective assistance of counsel. The proposed test both recognizes and protects the right to effective assistance of counsel. It does not permit a court to engage in a prejudice inquiry that allows that court to reach the paradoxical conclusion that although the defendant has not had the benefit of effective assistance of counsel, the trial result can stand.

CONCLUSION

The sixth amendment right to the effective assistance of counsel is indispensable to an adversarial system of justice that defines a fair trial as one in which an accused’s procedural rights are protected. In Strickland v. Washington, the Supreme Court admitted that a fair trial is defined “through the several provisions of the Sixth Amendment”\textsuperscript{174} but proceeded to fashion a test for ineffective assistance of counsel that sacrifices the explicit rights stated in the sixth amendment on a judicially created altar of fairness. Once an accused proves that counsel was not “the ‘counsel’ guaranteed the defendant by the Sixth Amendment[,]”\textsuperscript{175} Strickland requires that the defendant further overcome the presumption that the trial was fair. Where the procedural rights guaranteed by the sixth amendment define a fair trial and where one of those procedural rights, namely the right to counsel, is denied, the trial must be deemed unfair. The denial of a constitutionally adequate trial

\textsuperscript{169} 581 F.2d 91 (5th Cir. 1978).
\textsuperscript{170} See id. at 93.
\textsuperscript{171} See id.
\textsuperscript{172} Id.
\textsuperscript{173} See id.
\textsuperscript{174} 104 S. Ct. 2052, 2063 (1984).
\textsuperscript{175} Id. at 2064.
is prejudicial per se. Thus, once a defendant proves a denial of the effective assistance of counsel, the defendant is entitled to a new trial.

Because the procedural rights enunciated in the sixth amendment ensure the fair operation of an adversarial system of justice, a test for ineffective assistance of counsel must be based on the needs of that system. The test proposed in this Comment is so grounded. Such a test might very well induce defendants to challenge the effectiveness of the assistance of their counsel. The possibility of a resulting burden on the court dockets is real. This does not, however, justify denying a defendant one of the sixth amendment procedural guarantees that collectively define a fair trial. When one of those protections is denied a criminal defendant, the trial is unfair and a new trial should be required.